QUESTION PRESENTED

Whether it violates the First Amendment for California, in the statutory scheme at issue in this case, to condition access to information on a speaker's expressive purpose?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous:

STATEMENT OF INTEREST

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with members in all 50 states.[1] WLF engages in litigation and the administrative process in a variety of areas. WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently, *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923 (1999). *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

STATEMENT

Section 6254(f)(1) of the California Government Code obliges every State and local law enforcement agency to "make public," without limitations pertinent here, the name, occupation, date of birth and physical description of every individual arrested by the agency as well as the date and time of the arrest, the nature of the charges, the circumstances surrounding the arrest, information regarding outstanding warrants and parole or probation holds, and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the submission of this brief. Letters of consent to the filing of this brief from counsel fo. the parties have been filed with the Clerk of this Court.

other information.[2] However, in the name of protecting the "privacy" of arrested individuals, Section 6254(f)(3) specifies that the *address* of any individual arrested by the agency shall be released only to persons who declare under penalty of perjury that *(1)* they have requested the information solely for "scholarly," "journalistic," "political," "governmental," or investigative purposes, and *(2)* the information "shall not be used directly or indirectly to sell a product or service to any individual or group of individuals."

SUMMARY OF ARGUMENT

Section 6254(f)(3)'s restrictions on the use of arrestee addresses violate the First Amendment.[3] This is not a statute that protects the privacy of arrestees but one that

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[2] Section 6254(f) specifies that "state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

> "(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdiction and parole or probation holds."

[3] Contrary to Petitioner's brief, the constitutionality of Section 6254's restrictions on access to, or the use of, information regarding victims or witnesses is not at issue in this case.

blocks offers of legal and other assistance to arrestees in the wake of an arrest—simply because those offers propose a commercial transaction or otherwise are not expressly permitted. Section 6254(f)(3) allows "noncommercial" uses of an arrestee's address that can destroy an arrestee's privacy, but prohibits "commercial" uses that can help the arrestee in time of need. The statute's categorical preference for "scholarly," "journalistic," "political," "governmental," and investigative uses of arrestee addresses over uses that facilitate commercial speech is impermissible. For these and the other reasons set forth below, Section 6254(f)(3) violates the First Amendment.

1. Section 6254(f)(3) impermissibly favors "noncommercial" speech over "commercial" speech. The asserted governmental interest—protecting the privacy of arrestees—does not support the statute's differential treatment of "commercial" and "noncommercial" uses of arrestee address information. If anything, the "noncommercial" uses of an arrestee's address that are authorized by the statute pose a *greater* threat to the arrestee's privacy than the "commercial" uses that the statute prohibits. Section 6254(f)(3) thus suffers from the same constitutional defect as the newsrack ordinance invalidated in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). This Court invalidated that ordinance because the interests it was claimed to serve—aesthetics and safety—did not support the ordinance's distinction between newsracks containing commercial handbills and newsracks containing editorial material. If Section 6254(f)(3) required persons seeking arrestee addresses to swear that they would *not* use that information for "scholarly," "journalistic," or "political" purposes, but *only* to offer products and services for sale, the limitation would plainly be held to violate the First

Amendment. The same result must follow where "noncommercial" speech is favored over "commercial" speech.

2. Section 6254(f)(3) also discriminates impermissibly *within* the categories of "commercial" and "noncommercial" speech. Under the clause permitting "journalistic" uses of arrestee addresses, a newspaper may use an arrestee's address to obtain a circulation-boosting interview with the arrestee, his family, or his neighbors; but the same information may not be used by a lawyer to offer legal representation to the accused. Under the clause permitting "political" uses of arrestee addresses, a politician could hold a press conference in the neighborhood of the accused to excoriate the crime; but a religious institution may not use the same information "to provide comfort" to the accused, as Petitioner acknowledges (Pet. Br. 12), and a legal-aid clinic could not use the information to offer the accused even *free* legal assistance—because those are not purposes the statute permits.

Even if the government might withhold arrestee addresses altogether, the First Amendment prohibits the government from conditioning access to information within its control on a person's pledge to use that information only for officially approved expression. Such a condition violates the First Amendment's principle of "equal access" that must apply "once the government has opened its doors." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).[4] The State may not avoid its constitutional

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[4] In this case, the government *had* fully "opened its doors" to third parties seeking arrestee address information. It subsequently *changed* the law to bar access to persons whose expressive uses of this (continued...)

obligation of content-neutrality by "opening its doors" only to those who pledge in advance to use the information only for government-approved purposes. Section 6254(f)(3) impermissibly discriminates against expression on the basis of its content and overturns the longstanding rule that the government has no copyright in government information. Its discrimination is particularly egregious because it is the State, itself, that benefits when offers of legal assistance to an arrestee are curtailed.

3. Section 6254(f)(3) is not narrowly tailored to serve a substantial governmental interest. The "privacy" interest invoked by the State in this case—the supposed interest of an arrestee in not being *contacted* by anyone offering a product or service, regardless of the manner or timing of the contact or the nature of the proffered product or service—is not constitutionally substantial. The arrestee obviously has a compelling interest, which Section 6254(f)(3) completely ignores, in learning about the availability of legal and other assistance in the wake of an arrest, as well as other goods and services for which the arrest may indicate a need. This Court, on the other hand, has held that speech may be curtailed to protect a listener's privacy only if "substantial privacy interests are being invaded in an essentially intolerable manner." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 (1980). There is nothing so inherently vexatious or injurious about a directed solicitation for goods or services, including offers of religious counseling or legal assistance, paid or unpaid, that could justify Section 6254(f)(3)'s blanket ban on the use of arrestee addresses for non-permitted purposes.

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[4](...continued)
information the government disapproved. *See* Pet. Br. 3-5.

Assuming that the government has a substantial interest in protecting arrestees from *some* targeted communications, that interest cannot support the permanent and unqualified ban on commercial and other uses of arrestee address information that Section 6254(f)(3) imposes. This Court has upheld prophylactic rules prohibiting lawyers from soliciting clients in person. or by direct mail in the immediate aftermath of an accident; but these rules were upheld on the basis of the causal link between the *particular* communication and the *particular* harm to be avoided, and these rules were no broader than necessary to avoid the harms in question. Section 6245(f)(3), by contrast, bars any use of arrestee addresses for commercial and other solicitations, without regard to the content of the solicitation, the time when the solicitation is made, or the manner in which the solicitation is made. Such a blunderbuss restriction on speech cannot be justified in the name of protecting an arrestee's "privacy."

ARGUMENT

I. SECTION 6254(f)(3) IMPERMISSIBLY FAVORS "NONCOMMERCIAL" SPEECH OVER "COMMERCIAL" SPEECH

This Court has squarely held that the First Amendment prohibits the government from treating "noncommercial" speech more favorably than "commercial" speech when interest the government purports to be serving is unrelated to any distinction between the two categories of expression. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Section 6254(f)(3) suffers from this fundamental flaw. The State's asserted interest—protecting an arrestee's privacy—does not support the statute's differential treatment

of "commercial" and "noncommercial" uses of arrestee addresses.

Whether an individual's privacy is violated by a third party's use of an individual's address—and the extent to which the individual's privacy is violated—is not determined by whether the information is used for a "commercial" or "noncommercial" purpose. Having one's address appear on the front page of the local newspaper, or being paid a visit by Geraldo Rivera and a camera crew, is surely a *greater* insult to one's "privacy" than receiving an offer of legal services, drug abuse counseling, or driving lessons through the mail, as the courts below recognized. *See* 146 F.3d at 1140; 946 F. Supp. at 828. Section 6254(f)(3) thus "permit[s] a variety of speech that poses the same risks the Government purports to fear," while curtailing "messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1935 (1999).[5]

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[5] Petitioner contends that Section 6254(f)(3) does not restrict speech but merely requires third parties such as Petitioner to discover arrestee address information through other sources. Pet. Br. 15; U.S. Br. 20. As the District Court recognized, however, Section 6254(f)(3) functions as a restriction on commercial speech because "[t]he government is the only source of this information and by statute is disseminating it to everyone except commercial users." 946 F. Supp. at 825 (emphasis omitted). Even if arrestee address information could be obtained through other sources, this Court has held that restricting one means of access to a speaker's audience is impermissible even if alternative means remain available. *Discovery Network*, 507 U.S. at 427 (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983)); *see also Consolidated Edison*, 447 U.S. at 541 n.10 ("government may [not] justify a content-based prohibition by showing that speakers have alternative means of expression"); *Linmark Assocs., Inc. v. Township of*

(continued...)

Indeed, in view of the information about an arrestee that Section 6254(f)(1) *requires* to be made public without limitation (name, occupation, physical description, nature of charges, outstanding warrants, etc.), the real effect of Section 6254(f)(3) is not to protect an arrestee's "privacy" at all, but instead to prevent the individual from being contacted by those in a position to meet the individual's most urgent needs in the wake of an arrest.[6] Through Section 6254(f)(3), the State—which has arrested the individual—strengthens its own prosecutorial hand by limiting the individual's access to legal and other assistance, while simultaneously authorizing the dissemination of address information for "noncommercial" purposes that will *maximize* the sacrifice of the individual's privacy.[7]

[5](...continued)
Willingboro, 431 U.S. 85, 93 (1977) (alternatives to which sign ban relegated sellers, which entailed "more cost" to sellers and were "less effective" in reaching audience, were not constitutionally adequate). Similarly, even if arrestees have other means of identifying sources of legal and other assistance, it is no answer that the listeners' need for information "should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by other means. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976). Here, as in *Virginia Pharmacy*, "the recipient's great need for the information sought to be disseminated * * * makes the * * * First Amendment claim a stronger rather than a weaker one." *Id.*

[6] Petitioner contends that Section 6254(f)(3) protects arrestees from discrimination in hiring and access to credit. Pet. Br. 10, 31-32. This contention is fanciful because, notwithstanding Section 6254(f)(3)'s limitation on the use of *address* information, Section 6254(f)(1) requires the *names* of all arrestees to be made public.

At best, Section 6254(f)(3) reflects the impermissible assumption that "commercial" uses of information are intrinsically less valuable than "noncommercial" uses and for that reason may be more readily restricted. This Court, however, has held that commercial speech may *not* be treated as categorically less "valuable" than noncommercial speech. The Court has stressed that an individual's interest in receiving commercial information "'may be as keen, if not keener by far, than his interest in the day's most urgent political debate,'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)), and the Court has affirmed "the general rule that the speaker and the audience, not the government, assess the value of the information presented," *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *see Greater New Orleans Broadcasting*, 119 S. Ct. at 1935-36 (characterizing this "general rule" as a "presumption"). Accordingly, where—as here—the government undertakes to restrict speech in the

[7] *Cf. Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997) ("[W]hen the state itself is prosecuting a defendant, it cannot lightly deprive its opponent of critical information which might assist the exercise of even a qualified right.") (invalidating restriction on lawyer solicitation in traffic offense cases). Petitioner, the Los Angeles Police Department, is a welcome, if unexpected, champion of the privacy rights of arrestees. The District Court, noting that Section 6254(f)(3) was proposed by state and local law enforcement agencies and district attorneys' offices, suggested that the provision "may have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." 946 F. Supp. at 828-29 & n. 7.

name of a non-speech related interest such as "privacy," it may not treat commercial speech categorically as less "valuable" than noncommercial speech, or as intrinsically more invasive. *See Discovery Network,* 507 U.S. at 418-19, 424-28.[8]

Section 6254(f)(3) suffers from the same constitutional defect as the ordinance invalidated by this Court in *Discovery Network*, whose "major premise," like Section 6254(f)(3)'s, was that "commercial speech has only a low value" relative to noncommercial speech. 507 U.S. at 418-19. *See also 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (rejecting viewpoint that "commercial" speech is of "lower value" than "noncommercial" speech).[9] But just as a newsrack's affront to aesthetic values does not depend on whether it contains apartment listings or editorial matter, the sacrifice of an arrestee's privacy through the use of his or her address does not depend on whether the use is "commercial" or

[8] Section 6254(f)(3) restricts commercial speech by prohibiting address information from being used for commercial purposes, but the address information, itself, is not intrinsically "commercial" speech. The "speech" that United Reporting publishes—that a particular person lives at a particular address—is simply "an unadorned, accurate statement." *See Rubin*, 514 U.S. at 494 (1995) (Stevens, J., concurring). The Ninth Circuit incorrectly concluded (146 F.3d at 1136-37) that United Reporting was engaged in "commercial speech" merely because it offers the address information for sale. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 265-66 (1964); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).

[9] For example, Senator Peace, a proponent of the legislation quoted by the District Court, declared that, while arrestee address information was "justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted." *See* 946 F. Supp. at 826.

"noncommercial." *See also Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 71-72 (1983) (government's asserted interest in protecting the public from "offensive" speech did not justify differential treatment of commercial and noncommercial speech). The privacy interest asserted by the State is simply unrelated to any distinction between "commercial" and "noncommercial" speech. *Discovery Network,* 507 U.S. at 428, 430. The uses of address information that are allowed threaten the same harms as those claimed to be threatened by the uses that are disallowed.[10]

Petitioner attempts to rescue Section 6254(f)(3) from this infirmity by arguing that the statute reflects a "balance" between "maintaining individual privacy" and "fostering an informed public." Pet. Br. 2; *id.* at 32. This Court rejected a similar attempt to make a virtue out of statutory inconsistency in *Greater New Orleans Broadcasting*. There, the government sought to justify Section 1304's exemption for casino-gambling advertising by Indian tribes as enabling tribes to generate revenues dedicated to tribal welfare—even though the exempted advertising undercut the government's interest in reducing the social costs of casino gambling,

[10] *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (city's interest in aesthetics and traffic safety did not justify distinction drawn by ordinance between commercial billboards, which were allowed, and noncommercial billboards, which were banned); *Carey v. Brown*, 447 U.S. 455 (1980) (state's interest in protecting residential privacy could not sustain statute permitting labor picketing but prohibiting non-labor picketing); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (distinction drawn by "Son of Sam" law between income derived from criminal's descriptions of his crime and other sources "has nothing to do with" State's interest in transferring proceeds of crime to victims).

which was the asserted justification for Section 1304's advertising restrictions. This Court rejected the government's proffered justification on the ground that such tribal advertising, whatever its benefits, presented the very same dangers as the speech that the restrictions imposed by Section 1304 were justified as a means of avoiding. 119 S. Ct. at 1934-35. So, here, the State's asserted interest in "fostering an informed public" cannot justify an exemption for "noncommercial" uses of arrest information that present the very same dangers to "privacy" that Section 6254(f)(3)'s restrictions on "commercial" uses are intended to prevent. The statute's distinction between "commercial" and "noncommercial" uses of arrest information "distinguishes among the indistinct" (*id.* at 1935) and "makes no rational sense" if the State's "true aim" is to protect an arrestee's privacy. *Rubin,* 514 U.S. at 488.

Ironically, the "balance" purportedly struck by Section 6254(f)(3) completely fails to take into account the *arrestee's* interest in being "informed" about the availability of assistance that may be needed in the wake of an arrest. An arrestee's interest in hearing from those able to provide such assistance is certainly more immediate and compelling than the public's interest in learning where the arrestee lives by reading about it in newspapers or viewing it on the evening news. In the name of protecting the arrestee's "privacy," Section 6254(f)(3) keeps the *arrestee* in the dark about the availability of urgently needed services. No weight at all was placed on the arrestee's interest in learning about the availability of such services. Instead, Section 6254(f)(3) treats the arrestee's interest in such knowledge as non-existent, and the fact of the speaker's commercial motive as both controlling *and* fatal. This hierarchy of values is contrary to this Court's commercial speech decisions. *Cf.*

Greater New Orleans Broadcasting, 119 S. Ct. at 1930 ("even if the [speaker's] interest in conveying these messages is entirely pecuniary, the interests of, and benefits to, the audience may be broader") (citations omitted).

Petitioner argues that the government should not be forced to choose between allowing unrestricted use of arrestee address information, on the one hand, and forbidding any use of arrestee address information, on the other. Pet. Br. 10; *see* U.S. Br. at 12, 33. That choice, however, is compelled by the First Amendment's requirement of content-neutrality. *See Discovery Network,* 507 U.S. at 427-28 (content-neutrality between "commercial" and "noncommercial" speech must be observed "even if we assume, arguendo, that the city might entirely prohibit the use of newsracks on public property," for "as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech").

II. SECTION 6254(f)(3) IMPERMISSIBLY DISCRIMINATES *WITHIN* THE CATEGORIES OF COMMERCIAL AND NONCOMMERCIAL SPEECH

It would be bad enough if Section 6254(f)(3) only favored "noncommercial" speech, as a category, over "commercial speech," as a category.[11] But Section

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[11] The United States argues that Section 6254(f)(3)'s discrimination between "commercial" and "noncommercial" speech is not subject to heightened scrutiny because it involves "no question of distinctions based upon viewpoint." U.S. Br. 11. But "the First Amendment means that

(continued...)

6254(f)(3) also discriminates *within* the categories of "commercial" and "noncommercial" speech. Section 6254(f)(3) permits the use of address information in the preparation of articles and research that help sell newspapers ("journalistic" purposes) and books ("scholarly" purposes). These uses not only sell "products" but are generally intended to produce a profit.[12] Section 6254(f)(3) also permits the use of address information by licensed investigators, who normally are paid for their work.

What Section 6254(f)(3) *prevents* are uses of address information that involve offers of goods and services *to arrestees*. A newspaper may use address information to arrange a circulation-boosting interview with the prime suspect in a sensational crime, but a driving school may not use address information to contact individuals whose arrests for traffic offenses suggest that they may have an interest in improving their driving skills.

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[11](...continued)
government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added); *Consolidated Edison Co.*, 447 U.S. at 537 (invalidating viewpoint-neutral agency order that allowed utility bill inserts to present information on some subjects, but not to address public controversies); *Discovery Network*, 507 U.S. at 428-29 (invalidating ordinance that banned commercial newsracks but allowed noncommercial newsracks because, "by any commonsense understanding of the term, the ban is content based" and the city had failed to offer any justification for the ordinance that was "content neutral").

[12] *Cf.* J. Boswell, *Life of Samuel Johnson* LL. D. 302 (R. Hutchins ed. 1952) ("No man but a blockhead ever wrote, except for money.") (quoted in *United States v. National Treasury Employees Union*, 513 U.S. 454, 469 n.14 (1995)).

Similarly, Section 6254(f)(3) does not permit all *non*commercial uses of arrestee address information. As Petitioner acknowledges, a political reformer may use arrestee address information to garner support for a campaign against "police brutality" (Pet Br. 13), but a religious organization may not use the same information "to provide comfort" to the accused (*id.* at 12).

Petitioner insists that Section 6254(f)(3) does not "deny a benefit to any * * * organization because that organization engages in disfavored speech" (Pet. Br. 11), but that is precisely what the statute does. The "benefit" at issue here—use of the addresses of individuals arrested by State and local law enforcement agencies—is available *only* to persons and groups who pledge to use that information *only* for communications approved by the State and who forswear uses disapproved by the State. This constitutes censorship, which the First Amendment forbids.

Indeed, Section 6254(f)(3) functions as a form of prior restraint, circumscribing the purposes for which information made available by the government is permitted to be used. Section 6254(f)(3) is particularly egregious because it handicaps arrestees in criminal cases in which the State, itself, is a party. This aspect of the statute invites the concern that "the stated interests are not the actual interests served by the restriction." *Edenfield*, 507 U.S. at 768.[13]

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[13] Petitioner's rhetoric-laden brief also implies that there is something improper about a business such as United Reporting meeting the market's demand for information available from the government. But Petitioner never explains why, if it is "exploitation" for United Reporting to facilitate contacts between an arrestee and defense lawyers
(continued...)

III. SECTION 6254(f)(3)'S PERMANENT AND UNQUALIFIED BAN ON THE USE OF ADDRESS INFORMATION IS NOT NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST

The government's asserted interest in protecting the "privacy" of arrestees cannot support the permanent and unqualified ban on the commercial use of arrestee addresses that Section 6254(f)(3) imposes. This Court has stated that "the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Consolidated Edison Co.* 447 U.S. at 541 (citation omitted); *see also Edenfield,* 507 U.S. at 769 (government may intervene where solicitation is pressed with "such frequency or vehemence as to intimidate, vex, or harass the recipient") (*citing Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 462 (1978)). Applying that principle, the Court has upheld a Florida bar rule prohibiting direct-mail solicitations of victims in the immediate aftermath of accidents, finding that such solicitations—by reason of their particular content and their particular timing—are an invasion of privacy that cause their recipients "substantial injury." *Florida Bar v. Went for It, Inc.,* 515 U.S. 618, 627-32 (1995).

But the Court has not upheld restrictions on communications directed to the home—even targeted direct-mail

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[13](...continued)
(*e.g.*, Pet. Br. 9, 13, 15, 21), it is not also "exploitation" for a journalist or scholar to use the same information to help sell newspapers or books, or for a politician to use this information to advance his or her career.

solicitations, *see Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988)—in the absence of a finding of such "concrete, nonspeculative harm." *Florida Bar,* 515 U.S. at 629. To the contrary, the Court has held that the government may not, in the name of protecting residential "privacy," prohibit visits by a door-to-door solicitor or communications by mail simply because the recipient might find the visits intrusive or the communications objectionable. *See Consolidated Edison Co.,* 447 U.S. at 542 & n.11 (billing inserts); *Martin v. City of Struthers,* 319 U.S. 141 (1943) (door-to-door solicitation); *see also Bolger,* 463 U.S. at 71-72 (direct-mail advertisements). The Court has rejected privacy justifications for limits on solicitation where those who are unreceptive can simply "terminate the call," *Edenfield,* 707 U.S. at 776, or throw the letter in the trash, *Bolger,* 463 U.S. at 72.

In contrast to the restriction upheld in *Florida Bar,* Section 6254(f)(3) prevents *all* solicitations to arrestees, regardless of what they offer and regardless of when or how they might be made, and the statute's restriction is permanent. Petitioner's ultimate justification for Section 6254(f)(3) is that an arrestee will experience "a sense of personal violation at the knowledge that [his or her] address and status as an arrestee * * * is on numerous commercial mailing lists." Pet. Br. 31. But this is merely an ornate way of saying that an arrestee may find receiving a directed solicitation to be "embarrassing"—a justification this Court has repeatedly held is *not* sufficient to support limitations on commercial speech. *See Zauderer,* 471 U.S. at 648; *Bolger,* 463 U.S. at 71-72; *Carey v. Population Services International, Inc.,* 431 U.S. 678, 701 (1977). This Court has emphasized that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial

speech are to retain their force." *Zauderer*, 471 U.S. at 649.[14]

Petitioner's claim that arrestees will experience such a sense of embarrassment is sheer assertion, which cannot justify a curtailment of commercial speech. *Edenfield*, 507 U.S. at 770-71 (State's burden of justification is not satisfied "by mere speculation or conjecture"; State "must demonstrate that the harms it recites are real"). It is at least equally likely that arrestees would *welcome*, and be *grateful* for, offers of legal or other assistance that may follow in the wake of an arrest. It does not appear that the Legislature, when it was considering Section 6254(f)(3), heard *any* complaints from individuals who actually had received directed solicitations following their arrest. *See* Pet. Br. 4. On the other hand, United Reporting produced "affidavits from many arrestees stating that they do not feel that the solicitations [barred by Section 6254(f)(3)] invaded their privacy and that they found them helpful in obtaining legal representation or other services," and Petitioner filed no contrary affidavits. 946 F. Supp. at 828. Petitioner also never explains how a person's supposed sense of "personal violation" at receiving a communication directed to him or

[14] It is no coincidence that Petitioner has defined the relevant injury as the sense of "personal violation" that supposedly flows from being on a mailing list. That is, in fact, the *only* "injury" to privacy that Section 6254(f)(3) can be considered tailored to prevent. "The means fit the ends only because the ends were defined with the means in mind." *Members of the Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 826 (1984) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). *See Amicus* Brief of New York at 15-16 (attempting to salvage Section 6254(f)(3) from underinclusiveness by arguing that the government is entitled to distinguish among "different types of privacy," "permitting the invasion of one type of privacy" while "avoiding infringements of other types").

her as an arrestee can be distinguished in any meaningful way from the person's sense of "personal violation" at having been arrested in the first place.[15]

Petitioner's professed desire to shelter arrestees from such hypothesized distress is insubstantial and cannot trump either an arrestee's *own* First Amendment interest in receiving offers of assistance that may be critical in the wake of the arrest, or a speaker's *independent* First Amendment interest in communicating with the arrestee.

[15] Even if some arrestees might object to having their addresses provided to third parties, including potential legal and religious counselors, the State could protect their privacy by withholding the addresses of objecting arrestees. *See Consolidated Edison*, 447 U.S. at 542 n.11; *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970).

CONCLUSION

Wherefore, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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